

EXHIBIT 1

UNITED STATES JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

HEARING IN RE: ACETAMINOPHEN - ASD/ADHD PRODUCTS LIABILITY
LITIGATION
MDL NO. 3043

TRANSCRIPT OF ORAL ARGUMENT
HEARD ON SEPTEMBER 29, 2022
ST. LOUIS, MISSOURI

Chairman: Honorable Karen K. Caldwell
United States District Court
Eastern District of Kentucky

Members: Honorable Dale A. Kimball
United States District Court
District of Utah

Honorable Matthew F. Kennelly
United States District Court
Northern District of Illinois

Honorable Madeline Cox Arleo
United States District Court
District of New Jersey

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SEPTEMBER 29, 2022

(The proceedings commenced at 9:33 a.m.)

3 **JUDGE CALDWELL:** Good morning. Welcome to
4 St. Louis. I would like to begin by thanking all of the
5 people here in the United States District Court for the
6 Eastern District of Missouri for hosting this hearing. In
7 particular, I would like to thank Judge Catherine Perry, a
8 former JPML member, and also Chief Judge Rod Sippel for
9 welcoming us. I would like to thank the clerk's office for
10 all of the work that they have done to assist us in making
11 this hearing possible.

12 So, again, welcome. And we will begin by hearing
13 our first case, MDL No. 3043. I see that counsel are already
14 lined up.

15 Is this Mr. Watts for the moving plaintiff in the
16 Aujenai Thomas action?

17 MR. WATTS: Good morning.

18 **JUDGE CALDWELL:** Before you begin, let me just say
19 to each counsel: If you would please make your appearance,
20 state the party that you're representing and the position you
21 take on the motion. We won't hold that time against you.

22 | Please proceed, sir.

23 **MR. WATTS:** I'm Mikal Watts. I represent the
24 Thompson plaintiffs who move for the Northern District of
25 California.

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1 Some updates, statistics. I believe last month a
2 certain judge got the Abbott infant formula case when there
3 were 18 actions in seven districts. When we filed this on
4 June 10, there were 19 actions in seven districts. But the
5 updated information is, as of yesterday, there's now 87
6 actions in nine different districts; 51 out of California, 18
7 in Minnesota, six apiece in the Western District of Missouri
8 and Nevada, two apiece in Washington and the Western District
9 of Arkansas, and one apiece in Arizona and the Eastern
10 District of Louisiana.

11 So we think that that data puts us more into the
12 In Re: Gardasil consolidate pile as opposed to consumer data
13 or the Supplemental Nutrition case you all decided last month
14 when there were seven and five actions respectively.

15 The other update I would give you is that some of
16 the papers talk about a proceeding in front of Judge Jon Tigar
17 in Oakland that involves some of the same preemption
18 arguments. This is a class proceeding dealing with
19 acetaminophen. It's been on file for a while. Pleadings were
20 filed, motions to dismiss under preemptions were filed, a
21 repleading. Those same motions in Morgan v. Albertsons is set
22 for a hearing on November 17th of 2022.

23 So that's really the updated data. We believe that
24 this meets all of the requirements of Section 1407. Same
25 operative facts, basically the same products, during prenatal

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1 exposure, failure to warn with respect to autism, long use of
2 product while pregnant and then there's a causation claim.

3 So with respect to the product, this Court's ruling
4 last month in In Re: Taasera Licensing talked about different
5 products that come together in the same field of technology.
6 We believe that acetaminophen-based products all come together
7 as something bearing consolidation.

8 And then lastly, with respect to common issues of
9 causation, we think this fits the Court's ruling in In Re:
10 Gardasil where you have a particular medication provided, an
11 allegation of causation that's consistent. There is some
12 argument in the papers with respect to autism spectrum
13 disorder and ADHD. I won't make that argument because I'm
14 only bringing the autism cases.

15 **JUDGE CALDWELL:** Thank you. You have two minutes
16 reserved for rebuttal.

17 Ms. Barriere.

18 Excuse me. I have just moved right into the second
19 argument. We have some questions from the panel for
20 Mr. Watts.

21 Thank you, Ms. Barriere. I apologize. I was trying
22 to cut my colleague off here.

23 **JUDGE KENNELLY:** I actually have a boatload of
24 questions.

25 **JUDGE CALDWELL:** We could be here for a long time.

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1 **JUDGE KENNELLY:** One kind of group of questions has
2 to do with how big is this likely to get. Does anybody know
3 what the percentage is of kids that get diagnosed with -- and
4 I know you don't have the ADHD cases, but isn't it a pretty
5 significant percentage of kids that get diagnosed with
6 something along the lines of ADHD?

7 **MR. WATTS:** I think that's a fair statement.

8 **JUDGE KENNELLY:** So this can get really gigantic?

9 **MR. WATTS:** Really, autism cases alone, I'll tell
10 you right now we are ordering medical records --

11 (Court reporter clarification.)

12 **MR. WATTS:** -- on 20,600 cases right now, so it's a
13 significant sum.

14 **JUDGE KENNELLY:** Why are no manufacturers being
15 sued?

16 **MR. WATTS:** The same answer. Lots of MDL panels
17 about early vetting. My experience in Zantac is people know
18 when they go and where they bought the drug from. And so the
19 store-branded acetaminophen is something that is -- at least
20 with Zantac data -- verifiable at a much higher rate than
21 whether Mom bought something that was branded versus a
22 generic, which as you know have different preemption
23 implications.

24 **JUDGE KENNELLY:** So that sounds like it's likely
25 that the manufacturers are going to get added at some point?

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1 **MR. WATTS:** Absolutely.

2 **JUDGE KENNELLY:** So then that leads to my follow-up
3 question then. So where -- on the assumption that the
4 manufacturers are eventually going to get added, where are
5 they located?

6 **MR. WATTS:** So Johnson & Johnson is the maker of
7 Tylenol. They stand in New Jersey. The second largest brand
8 manufacturer -- which is an ever decreasing percentage of the
9 overall acetaminophen market -- is GlaxoSmithKline. There's
10 an argument about where they are based. We say Pennsylvania;
11 they say North Carolina. But I think they would take the
12 position it's North Carolina.

13 **JUDGE KENNELLY:** I thought I saw there's -- I'm
14 blanking on the name. There was something with an acronym
15 that was the manufacturer for some of the generics.

16 **MR. WATTS:** Yeah, LNK.

17 **JUDGE KENNELLY:** Where are they?

18 **MR. WATTS:** Hold on just a second. I believe in New
19 York.

20 **JUDGE KENNELLY:** New York. Okay.

21 **MR. WATTS:** And our response to that basic argument
22 is unlike Zantac, which deals with how it is manufacturing,
23 there are no allegations with respect to the manufacturer.

24 **JUDGE KENNELLY:** This is all about disclosure?

25 **MR. WATTS:** That's right.

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1 **JUDGE KENNELLY:** Okay.

2 **JUDGE KIMBALL:** Well, the good news is Judge
3 Kennelly asked all the questions I was going to ask.

4 **JUDGE KENNELLY:** That's why I wanted you to go
5 first.

6 (Indiscernible comments and laughter.)

7 **JUDGE ARLEO:** I had the same questions.

8 **MR. WATTS:** Thank you, Your Honor.

9 **JUDGE CALDWELL:** Thank you.

10 Now Ms. Barriere. Thank you.

11 **MS. BARRIERE:** Good morning. May it please the
12 panel. My name is Ashley Barriere.

13 **JUDGE KENNELLY:** With these microphones -- we have
14 these rotten microphones in my court, too. They have to be
15 pointing right at your mouth, like directly --

16 **MS. BARRIERE:** Is this better?

17 **JUDGE KENNELLY:** If they are pointing to the side,
18 they don't work. Even more.

19 **MS. BARRIERE:** This way?

20 **JUDGE KENNELLY:** It's literally the axis has to be
21 coming straight through your throat almost.

22 (Laughter)

23 **JUDGE ARLEO:** These may be defective microphones.
24 It's in every courtroom across the country. Just some
25 thoughts.

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1 **JUDGE KENNELLY:** I renounce on that case.

2 (Laughter)

3 **MS. BARRIERE:** I will try it again. Does this work?

4 Okay. May it please the panel. My name is Ashley
5 Barriere of Keller Postman and I represent Michelle Maguire
6 and others. We support consolidation in the Northern District
7 of California.

8 Given the scope of the litigation, which Mr. Watts
9 also touched on, the national scope of the litigation is since
10 that plaintiffs will be scattered all over, no one focal point
11 stands out as to where to consolidate the case.

12 Here we believe the Northern District of California
13 makes the most sense, as there are currently 21 cases pending
14 there and is also a district with a deep bench of judges with
15 MDL as well as general complex litigation experience. That
16 experience we believe will be critical here, given the
17 potential large number of plaintiffs as well as defendants, as
18 management will be critical, I think, to the MDL success.

19 In particular, and as we stated in our papers, we
20 believe Judge Tigar would be the optimal choice to preside
21 over the MDL. He has had an MDL before. Actually, he
22 currently has an MDL, but currently only has 56 actions
23 pending. And as Mr. Watts mentioned, he's currently presiding
24 over a proposed class action involving the rapid release of
25 Tylenol that implicates the same preemption issues that will

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1 arise here and is set for hearing on November 17th.

2 We also believe the Northern District of California
3 is better suited for these cases than the defendants'
4 proposals of the District of New Jersey and the Western
5 District of Arkansas. The Western District of New Jersey is
6 currently experiencing a backlog. Average time to trial is
7 50.2 times [sic] from filing to trial. And, frankly, the
8 Western District of Arkansas is just simply not a convenient
9 location for air travel, given that the closest non-regional
10 airport is 100 miles away.

11 So in closing, Judge Tigar and the Northern District
12 of California we believe are uniquely suited to handle the
13 anticipated docket in these consolidated actions. And I will
14 reserve my time for any questions.

15 **JUDGE CALDWELL:** Yes.

16 **JUDGE KIMBALL:** What do you think about the Southern
17 District of New York as a possible venue for this?

18 **MS. BARRIERE:** I think we would also say it's not as
19 congested as the District of New Jersey, but it also is not --
20 there are no cases currently pending there. So I think we
21 would think, given kind of the landscape, the Northern
22 District of California would be preferable.

23 **JUDGE KENNELLY:** Right. But, I mean, the reason
24 there are no cases pending there is because people have chosen
25 not to file them there.

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1 **MS. BARRIERE:** That's true, Your Honor.

2 **JUDGE KENNELLY:** I think it's this case where
3 somebody on the other side makes the arguments, wait a second,
4 Northern District of California has got proportionately more
5 MDLs per judge than in any other district, the two are
6 overloaded, so why send them there? So what do you have to
7 say about that?

8 **MS. BARRIERE:** Right. I think there are more MDLs.
9 But I think even our papers state this. The actual numbers in
10 each -- I believe there are 18 MDLs pending there, but the
11 actual numbers, I think there are only four upwards of three
12 digits. So they are not these kind of massive MDLs that are
13 clogging other districts. And I do note, Your Honor, there
14 are some --

15 **JUDGE KENNELLY:** So the ten-case MDLs are
16 no-brainers; they're easy?

17 (Laughter)

18 **MS. BARRIERE:** No. And I didn't mean to suggest
19 that. It may not be as overwhelming for the clerk's office,
20 in particular.

21 **JUDGE ARLEO:** I take it, too, that you expect that
22 the manufacturers will be added?

23 **MS. BARRIERE:** Yes.

24 **JUDGE ARLEO:** Given the breadth of this MDL, aren't
25 there going to be plaintiffs in every state in the country?

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1 **MS. BARRIERE:** Yes, Your Honor, I do believe that's
2 true. And that's why I think kind of the convenience of the
3 parties here isn't as important because it's going -- there
4 are going to be plaintiffs parties everywhere, so I do
5 understand that some of the manufacturers may be clustered in
6 that Northeastern District. But it is going to be truly
7 national MDL in scope, and that's why I think the Northern
8 District of California is so well suited because they are such
9 a deep bench of jurists with complex litigation experience.

10 **JUDGE ARLEO:** Any objection to New Jersey?

11 **MS. BARRIERE:** Yes. I think just given the backlog
12 of cases there, it wouldn't be the ideal location for an MDL.

13 **JUDGE KENNELLY:** So is there a reason to think that
14 this is a case that might attract state attorney general
15 lawsuits? Like obviously opiates did. Here is the theory.
16 And I'm not a plaintiff's lawyer, obviously. But the theory
17 would be the state or localities are spending all of this
18 extra money on education for kids who have one or both of
19 these disorders. There's an interest. I mean, I would think
20 that there's at least some chance that some state attorney
21 general, state attorney general somewhere might jump in.

22 **MS. BARRIERE:** Sure, Judge. To be frank, I haven't
23 given that particular theory much thought as to the state
24 attorney generals. I think there's a likelihood that may
25 arise. I'm not aware of any discussions of such filings, but

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1 I don't think at this point there's any reason to think --

2 **JUDGE KENNELLY:** When folks do that, do they tend to
3 represent themselves or do they tend to hire outside counsel
4 or some of both?

5 **MS. BARRIERE:** The state attorney generals?

6 **JUDGE KENNELLY:** Yeah.

7 **MS. BARRIERE:** I think there's usually a mixture.

8 **JUDGE CALDWELL:** Anyone else?

9 Thank you very much.

10 **MS. BARRIERE:** Thank you.

11 **JUDGE CALDWELL:** Ms. Williams.

12 **MS. WILLIAMS:** Now I am nervous about the
13 microphone. Am I in the right spot?

14 **JUDGE KENNELLY:** Perfect actually.

15 **MS. WILLIAMS:** All right. Good morning, Your
16 Honors. May it please the Court. Amanda Williams from
17 Gustafson Gluek on behalf of the Funk plaintiffs. We are
18 requesting that the Court consolidate the cases under 1407 and
19 send them to the District of Minnesota.

20 As Mr. Watts mentioned earlier in his rundown of the
21 statistics, the District of Minnesota now has 18 cases. That
22 is the second highest outside of California. There are
23 several factors that you consider in these things.

24 Target, who is a retailer who has been brought in on
25 several cases, is headquartered in Minneapolis. The district

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1 has regularly handled large MDLs, complex cases involving
2 pharmaceuticals and medical devices. They are well versed in
3 preemption among other issues. But I think most importantly
4 is that the district is well resourced and has the bandwidth
5 right now to take on a case that could be very large.

6 Now, there are always the usual arguments, right?
7 Minneapolis is in the middle of the country. It's easy to get
8 to. We have a Delta hub at our airport. All fun things like
9 that. But overall, I think the depth of the bench at the
10 District of Minnesota is extraordinarily deep and willing to
11 take on such a big case.

12 **JUDGE CALDWELL:** Questions?

13 Thank you very much. We have none.

14 **MS. WILLIAMS:** Thank you.

15 **JUDGE CALDWELL:** Mr. Kinsman.

16 **MR. KINSMAN:** May it please the panel. Good
17 morning. Robert Kinsman on behalf of Krause and Kinsman and
18 multiple plaintiffs in the Western District of Missouri,
19 including the Gaddis family.

20 I first want to start that when we first started
21 Krause and Kinsman out of law school eight years ago, it was
22 our ten-year goal to argue in front of the JPML. It's now
23 multiple times we have argued in front of you so it's an honor
24 to be here today.

25 It's not lost on me that the Western District of

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1 Missouri has asked for a lot and they have received a few
2 MDLs, but I think it's important to note that there's a reason
3 for that; and that's because of the respect that our peers and
4 the bar has for the judges in the district there, specifically
5 the MDL judges.

6 They are creating a complex litigation hub that
7 could be future home to MDLs for years to come. They are the
8 fastest of any of the districts being argued from time to
9 filing to trial. There's no vacancies. The first cases were
10 filed by our firm. The judges are a cohesive unit. They
11 promote collaboration between the parties, including
12 meet-and-confers before any motion practice. They are also
13 not overwhelmed with MDLs. I think Judge Bough has the least
14 amount of cases within his MDL, and I think it's ripe for him
15 to get another one.

16 Judge Wimes is newer to the bench, has a recent MDL.
17 Judge Phillips also has an MDL and is chief judge there. But
18 Judge Bough's medical background, I think, is perfect for this
19 case. He has product liability background. You are going to
20 hear argument for Western District of Missouri later for an
21 addiction case. I think that Judge Wimes and Judge Phillips,
22 their experience as prosecutors are perfect for an addiction
23 case.

24 And I think -- I also want to note that Walmart had
25 filed in August a motion to transfer in the District of

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1 Minnesota to send the APAP cases there to the Western District
2 of Missouri as their primary preference, not the Western
3 District of Arkansas. Western District of Arkansas was the
4 alternative preference to Walmart.

5 I'm happy to answer any questions.

6 The one thing I would like to add, too, I know I'm
7 running out of time, but there may be argument and there was
8 some briefing that we potentially may want to send each
9 retailer MDL to a different district. I think that certainly
10 doesn't avoid disrupting the functions of the federal court.
11 These cases need to be in front of one judge, specifically and
12 most importantly if we are bringing manufacturers in and how
13 we end up doing that and the discovery behind it.

14 **JUDGE CALDWELL:** Your time is up. Judge Kennelly.

15 **JUDGE KENNELLY:** I should have asked this to
16 somebody earlier, so I will stick you with it.

17 The papers talk about these studies that show an
18 association. Has anybody come up with a study yet that shows
19 a mechanism?

20 **MR. KINSMAN:** A mechanism? Well, there is -- I
21 don't even think the retailers and the manufacturers know the
22 mechanism of how acetaminophen actually relieves pain.

23 **JUDGE KENNELLY:** That's not what your lawsuit is
24 about. I'm asking what your lawsuit is about.

25 **MR. KINSMAN:** There's no argument that there's not a

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1 strong correlation between APAP and autism when exposed in
2 utero. The causation is currently being built by a bunch of
3 lawyers working on the case and the experts that are
4 currently --

5 **JUDGE KENNELLY:** I will take that as kind of a long
6 no.

7 || (Laughter)

8 **MR. KINSMAN:** I don't ever like to say no or yes, if
9 you can tell. But there is a causation component being
10 developed, as Mr. Watts indicated as well.

11 ||| **JUDGE CALDWELL:** Anyone else? Thank you very much.

12 MR. KINSMAN: Thank you.

13 **JUDGE CALDWELL:** Now we will hear from the defense
14 side. Mr. Murdica.

15 **MR. MURDICA:** Good morning, Your Honors. May it
16 please the panel. I'm Jim Murdica. I represent CVS, Costco
17 and Walgreens.

18 Here today you have before you for the defendants
19 zero percent of 600-plus manufacturers of over 700 U.S.
20 marketed acetaminophen products. Zero. What you do have
21 before you is less than one percent, less than one percent of
22 all the sellers of acetaminophen. That's the market share,
23 less than one percent of manufacturers.

24 We just heard for the first time that -- they didn't
25 say it in a reply to our opposition. It was heard for the

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1 first time this morning that they are going to bring in
2 manufacturers. So, you know, we don't even know what this
3 case is going to look like. This is how they built it.

4 (Court reporter clarification.)

5 **MR. MURDICA:** This is how plaintiffs chose to build
6 this litigation. They put in page 12 of their petition that
7 they had a meeting that they think this is going to be the
8 largest MDL of all time in U.S. history. If that's true, I
9 urge the panel to wait and let's see what happens. Let's see
10 if they name the manufacturers. Let's see if there's cases
11 all around the country.

12 On behalf of my clients, we just went through this
13 in Zantac. I represent Costco, CVS, Walgreens and 11 other
14 retailers in Zantac. Now, we got dismissed on the basis of
15 preemption. Rosenberg did a great job. But it took almost
16 three years, three rounds of motion to dismiss briefing, and
17 we spent millions and millions and millions of dollars.

18 This litigation is ultimately not going to be about
19 the clients that I represent. It would be manifestly unfair
20 to MDL this now and put the retailers, the only ones they have
21 chosen to sue so far, through this.

22 For that reason, where the cases are filed now, who
23 they are filed against, I mean none of them --

24 **JUDGE ARLEO:** You need to use the microphone a
25 little more.

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1 **MR. MURDICA:** Sorry.

2 **JUDGE ARLEO:** That's okay.

3 **MR. MURDICA:** Where the cases are filed now
4 shouldn't really matter if you are going to make a decision to
5 MDL the case. It's going to be defendants that aren't
6 involved yet and, you know, and where the evidence is. And
7 that, as I think you guys have correctly pointed out in your
8 questions, is probably going to be in New Jersey, in New York.
9 And that's why our clients said in the alternative, that's
10 where we want to be.

11 But, again, my last point, back to where I started,
12 rather than think about consolidation, let's take a pause. I
13 urge the panel to deny consolidation at this time. Let's see
14 what this looks like. My clients are prepared to litigate the
15 cases that exist.

16 And we don't know what will actually happen. People
17 stand before you all the time and say, "If you build it, they
18 will come." I'm going to tell you something a little bit
19 similar to that, but if you don't build it, they may not come.
20 All the cases are filed in the Eighth and Ninth Circuit. I
21 believe there's a reason for that. This might be one big
22 trial balloon.

23 **JUDGE KENNELLY:** You said one big trial balloon?

24 **MR. MURDICA:** I'm sorry.

25 **JUDGE KENNELLY:** You said this may be one big what?

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1 **MR. MURDICA:** Trial balloon.

2 That's all. Thank you very much, Your Honors.

3 **JUDGE CALDWELL:** Yes. Judge Kimball.

4 **JUDGE KIMBALL:** How many cases are there right now
5 against your clients?

6 **MR. MURDICA:** More than 40. About half.

7 **JUDGE CALDWELL:** Yes, Judge Kennelly.

8 **JUDGE KENNELLY:** I think I heard you say that right
9 now less than one percent of the sellers are sued. Did you
10 mean retail sellers?

11 **MR. MURDICA:** I should have said the sales, Your
12 Honor.

13 **JUDGE KENNELLY:** Okay.

14 **MR. MURDICA:** When you factor in the market share of
15 the store-branded products, it's less than one percent.

16 **JUDGE KENNELLY:** Okay. So the store-branded
17 products are less than one percent of the overall sales?

18 **MR. MURDICA:** The ones that are before the Court,
19 yes. And generally I think that's true as well.

20 **JUDGE KENNELLY:** Okay. So you said your client is
21 named in -- you just answered Judge Kimball's question -- how
22 many lawsuits now?

23 **MR. MURDICA:** Forty to 43. I'm not sure.

24 **JUDGE KENNELLY:** You think it is done right there?
25 I mean, let's say we do what you say. You think it's done

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1 right there? You are not going to get to 45, in other words?

2 **MR. MURDICA:** For the retail clients, yes. For the
3 clients I represent, I believe that is true.

4 **JUDGE KENNELLY:** So you are then going to have to
5 litigate 45 preemption motions in front of 45 judges. And
6 then in three months, when they sue the manufacturers and come
7 back here, then people are going to be talking about -- you
8 are going to be lining up the ones that said yes and the ones
9 that said no, and one side is going to say send to it these
10 folks and one side is going to say send it to these folks.
11 That doesn't make any sense to me.

12 **MR. MURDICA:** If that's what happened, I would agree
13 with Your Honor, but I'm not sure that's right.

14 **JUDGE KENNELLY:** So nobody is going to rule on the
15 preemption motions that you're going to file?

16 **MR. MURDICA:** Plaintiffs may choose not to pursue
17 the retail defendants.

18 **JUDGE KENNELLY:** Oh, I see.

19 **MR. MURDICA:** I believe they will go after the
20 manufacturers, which is -- you know, retail defendants have a
21 lot of defenses in addition to preemption. There are seller
22 statutes in most states. All they do is sell sealed packages.
23 They didn't make any of this. So the case against retailers
24 is really tough, which is why the retailers were dismissed
25 from Zantac.

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1 **JUDGE KIMBALL:** You really do not anticipate very
2 many more cases against the retailer?

3 **MR. MURDICA:** I take the plaintiffs at their word.
4 They have 20,000-plus claims. I don't believe the retailers
5 will be the target of this. They didn't manufacture the
6 acetaminophen. They didn't provide whatever warnings are on
7 the package.

8 And it's going to be a hard enough case. There were
9 some questions about merits a minute ago and how it would
10 work. And, you know, one thing that hasn't been said and
11 isn't in the papers is the prospect of success here. It's
12 very difficult. FDA said in July of this year: We evaluated
13 research studies on acetaminophen published in the medical
14 literature and determined that they are too limited to make
15 any recommendations based on the studies at this time.

16 That is daunting. We all know that. That is going
17 to be very difficult to overcome.

18 **JUDGE ARLEO:** So isn't this all just guesswork on
19 one level? Isn't it equally plausible that if we deny it
20 there will be more lawsuits in different districts and have
21 the plaintiffs come back here and say, now, look, we have more
22 retailers and we are going to have to make -- some judges in
23 20, 30 different districts are now going to have to rule on
24 motions to dismiss.

25 In other words, there are already 40. And you are

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1 just assuming that no more will be filed. And you are
2 assuming that wait and see if the manufacturers come in.
3 Either way, there's going to be a lot of cases and a lot of
4 motions spread across this country. Isn't that inefficient?

5 **MR. MURDICA:** If they choose to bring them, Judge
6 Arleo.

7 **JUDGE ARLEO:** But even if they -- how do you know
8 that they won't, at a minimum, bring in additional retailers
9 throughout the country?

10 **MR. MURDICA:** You mean --

11 **JUDGE ARLEO:** They have suggested that they will.
12 In other words, there could be more filed as a reason to come
13 back here and say, now, look, it's all over the country, we
14 now have 100, we now have 75. No one has assured you that
15 there will not be more retailer cases filed imminently.

16 **MR. MURDICA:** No, not at all. I wouldn't know that.

17 **JUDGE ARLEO:** Right. So you are asking us to make
18 an assumption that could be wrong. It could be if we deny it,
19 you can turn around and get 50 more cases filed in the next
20 two months.

21 **MR. MURDICA:** That's entirely possible, Judge Arleo,
22 but look at the facts of what has happened so far. The first
23 case was filed June 1. There is a petition June 9. It's all
24 the same plaintiffs working together. And it seems like they
25 have intentionally not named a manufacturer until we just

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1 heard that today. And if you look at where the cases are
2 filed, the Eighth and Ninth Circuit, and you look at what
3 happened in Zantac with respect to preemption for all
4 generic --

5 (Court reporter clarification)

6 **MR. MURDICA:** Preemption for all generic
7 manufacturers and for all retailers, they are gone out of the
8 MDL now. And as the panel is probably aware now, everyone is
9 running to state court.

10 I believe there's a reason why they chose only to
11 file in the Eighth and Ninth Circuit to shop for, you know, a
12 potentially favorable preemption ruling. If they don't have
13 all of the cases in one place where they can possibly survive,
14 this is a very daunting case on regulatory and causation.

15 **JUDGE KENNELLY:** I will bite on that. So is it like
16 really good luck for plaintiffs in the Eighth Circuit on
17 preemption?

18 (Laughter)

19 **MR. MURDICA:** No, but we know the Eleventh Circuit
20 is out.

21 (Laughter)

22 **JUDGE KENNELLY:** Then you just cut your own
23 argument.

24 **MR. MURDICA:** Well, Judge Kennelly, it is more
25 feasible that they have a shot in the Eighth Circuit. And

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1 certainly in the Ninth Circuit there is better law on that,
2 particularly --

3 **JUDGE KENNELLY:** And that's why I didn't ask about
4 the Ninth.

5 (Laughter)

6 **JUDGE KENNELLY:** You said the Eighth and the Ninth.
7 That's why I was asking you about the Eighth. You think
8 Bentonville, for example, it's either Minneapolis or
9 Bentonville, I guess, right?

10 **MR. MURDICA:** In the Eighth Circuit?

11 **JUDGE KENNELLY:** Yeah.

12 **MR. MURDICA:** Judge Kennelly, I didn't study
13 preemption law in the Eighth Circuit, but I can tell you that
14 there isn't --

15 **JUDGE KENNELLY:** Well, I would just suggest that
16 before you say that the Eighth Circuit is part of this shot to
17 get good preemption law, you might want to do that. Just a
18 suggestion.

19 **MR. MURDICA:** There are no very positive
20 defense-oriented decisions on preemption in this context to my
21 knowledge in the Eighth Circuit. There are in other -- in
22 other circuits there are decisions that make it very clear
23 what would happen for a case like this.

24 **JUDGE CALDWELL:** Any other questions?

25 **JUDGE ARLEO:** That's it.

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1 **JUDGE CALDWELL:** Thank you very much.

2 **MR. MURDICA:** Thank you very much, Your Honors.

3 **JUDGE CALDWELL:** Mr. Zimmer.

4 **MR. ZIMMER, JR.:** Good morning, Your Honors. Fritz
5 Zimmer of King & Spalding for Walmart, Inc. I will confirm,
6 as Your Honor requested, that our position is that impaneling
7 an MDL is premature at this point. It's unnecessary. But if
8 you do so, we would suggest it be a Walmart-only MDL in the
9 Western District of Arkansas.

10 So a quick update. On a number of cases that have
11 been filed against my client, we are aware now, as of late
12 last night, of 45. Thirty-five of those involve Walmart only.
13 Just part of the suggestion we are making to the court.

14 **JUDGE ARLEO:** Just please use the microphone.

15 **JUDGE KENNELLY:** What you have to do -- and this is
16 for everybody. Imagine this thing is an arrow. It has to be
17 pointing straight into your throat. I'm telling you, I've
18 been working with these things for ten years.

19 (Laughter)

20 **MR. ZIMMER, JR.:** Thank you, Your Honor. I'm doing
21 my best. Is this better?

22 **JUDGE KENNELLY:** Yes.

23 **MR. ZIMMER, JR.:** All right. Thank you. I will
24 stay as close as I can to it.

25 Like all the defendants, we don't think that the

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1 panel should speculate, of course, about what might be coming,
2 although of course it was instructive to hear today that the
3 manufacturers are to be named. But I honestly don't believe,
4 nor can I imagine any of you do, that this case is about
5 retailers.

6 Sorry. I just have to pause there for a moment.
7 Everybody before you is a retailer. That just does not make
8 sense in this context.

9 So the reason we think this is premature, based on
10 what is before you, is that all of the lesser steps that the
11 panel has previously encouraged, we've been trying to employ.
12 Motions to transfer per the first filed rule, 1404 motions.
13 And, in fact, because the Northern District has been
14 mentioned, we filed notices of related cases, and all of the
15 cases in the Northern District are now being transferred to
16 Judge Chesney who had the lower numbered rule case there. So
17 those efforts are underway.

18 I have already mentioned the elephant in the room.
19 I think that it's inappropriate for the panel to let the tail
20 wag the dog with retailers dictating where this might be
21 impaneled and that manufacturers to be brought in later to
22 follow. I would think that they would want input.

23 Finally, forcing retailers into an MDL is not going
24 to encourage efficiency because, as the panel has seen before,
25 each retailer is going to have different suppliers,

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1 manufacturers, products, development processes, labels,
2 marketing and sales data, QC procedures, pricing -- you name
3 it. This is going to create an unwieldy mess for whoever you
4 hand this to if it is impaneled because of the need for an
5 incredibly complex array of protective orders and conceivably
6 even separate tranches of discovery and the like because of
7 the number of products that all the different retailers will
8 have sold.

9 So hence Western District of Arkansas. Second in
10 line for us was, indeed, Missouri, if you feel compelled to do
11 it. And, once again, we are doing this by the rules. First
12 filed cases were in Missouri. Next, closest to where our
13 client is based, convenience of parties and witnesses would be
14 Arkansas.

15 Last point, Your Honor, though I know Ms. Groves is
16 going to address this, is if you have any questions and would
17 like me to comment on the Northern District, that's where I'm
18 based but, of course, it's in my client's interest that we are
19 advocating these other places.

20 **JUDGE CALDWELL:** Your time is up. Questions? Judge
21 Kennelly.

22 **JUDGE KENNELLY:** So speaking only for myself, let me
23 just tell you what I think. At least part of the dilemma is
24 on this "too early" thing. I mean, I get what you're saying.
25 They haven't sued the manufacturers. Let's wait for the

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1 manufacturers. Let's see what happens.

2 Here is the flip side of that. So the flip side of
3 that is we wait. And lawsuits keep getting filed as they are
4 filed now and eventually manufacturers start getting added in.
5 By then, you know, maybe a dozen or a couple of dozen, three
6 dozen judges have ruled on preemption motions and various
7 other things. I guarantee you somebody is going to come in
8 here and say they waited too long to do it. I guarantee
9 that's going to happen.

10 Or that, well, you are trying to pick the judge that
11 ruled favorably on the preemption or the defense is trying to
12 pick the judge that ruled favorably on the preemption.
13 Because everybody is going to have a preemption argument at
14 some level. Right? Even the manufacturers from the FDA.

15 So that's the dilemma. I don't think there's a --
16 there's no good resolution to it, but can you react to that?

17 **MR. ZIMMER, JR.:** I will, Your Honor, and only very
18 briefly and say this: We are not trying to engineer where
19 that's done. We are literally playing it by the book. And I
20 will tell you that within two weeks of today, there will be
21 two fully briefed motions to dismiss in the Western District
22 of Arkansas ready for Judge Brooks to rule on them. There are
23 three others that will follow that and are close behind.

24 **JUDGE KENNELLY:** Also in Western Arkansas?

25 **MR. ZIMMER, JR.:** No, those are in the Western -- in

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1 Missouri. Those are before, I believe, Judge Kays.

2 So what I'm getting at is, I don't see any reason
3 why those judges can't lead this process. There's a lot more
4 deference than people might imagine, once the first judge to
5 rule on motions of that type does so.

6 **JUDGE KENNELLY:** Thank you very much.

7 **MR. ZIMMER, JR.:** You bet.

8 **JUDGE CALDWELL:** Anything else?

9 Thank you very much.

10 **MR. ZIMMER, JR.:** Thank you, Your Honors.

11 **JUDGE CALDWELL:** Ms. Groves.

12 **MS. GROVES:** Good morning, Your Honors. Amanda
13 Groves for Defendant Safeway. And, Your Honors, I'm just
14 addressing the Northern District of California as a potential
15 location, as I represent Safeway, who happens to be the only
16 defendant in the Northern District of California.

17 And we are actually the only defendant in all of
18 California, for that matter, and we have one case filed
19 against us to date, and it's by a plaintiff who isn't from the
20 Northern District of California or from California, for that
21 matter, either. She lives in Washington.

22 The Northern District of California is not the
23 center of gravity for these lawsuits. As has already been
24 discussed, the manufacturers are not located in the Northern
25 District. And plaintiffs have never disputed that they are

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1 the ones who are likely to have the bulk of the evidence in
2 this litigation.

3 If you picture a map of the United States, you have
4 Safeway in California, Costco in Washington, and you have to
5 go all the way out east to Minnesota to find another
6 retailer -- or Arkansas -- and then everybody else, including
7 the manufacturers that we are aware of, are farther east than
8 that. So the center of gravity really tilts towards either
9 the upper midwest or to the Tri-State area.

10 Particularly, now that courts are returning to
11 in-person hearings, the California forum would be costly and
12 inefficient if an MDL, in fact, is granted.

13 Also, Your Honors, judicial efficiency does not
14 favor transfer to the Northern District of California. It
15 still has the most active MDLs in the country and it still has
16 three judicial vacancies. Multiple districts are closer to
17 the facts and have lighter MDL dockets.

18 And of the venues that have most frequently come up
19 in the papers, the Northern District of California has the
20 longest median time to dispose of civil cases and nearly
21 900 cases per judge, which puts it among the highest of the
22 courts suggested.

23 I did want to address very briefly plaintiffs'
24 argument for Judge Tigar which is curious because Judge Tigar
25 doesn't have a single one of the dozens of cases that have now

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1 been filed in the Northern District of California. And under
2 the local rules there, notice of related cases are supposed to
3 be filed and the cases get assigned to the first filed judge,
4 which in the Northern District is Judge Chesney.

5 And at least one of the plaintiffs have used this
6 "earliest filed" cases to suggest that Judge Menendez in the
7 Northern District -- District of Minnesota, rather, would be
8 an appropriate judge. But no one has -- they are not using
9 that same argument for Judge Tigar. He doesn't have a single
10 case.

11 And the case that he does have before him is very
12 different than these product liability failure-to-warn cases.
13 He has a case about false advertising and whether rapid
14 release, which has been defined in a monograph that was
15 adopted by the CARES Act, should control. It's not the same
16 preemption issue and a review of the briefing would
17 demonstrate that.

18 Thank you.

19 **JUDGE CALDWELL:** Thank you. Questions? Judge
20 Kennelly.

21 **JUDGE KENNELLY:** You use the phase "Tri-State area."
22 Where I come from that means Wisconsin, Illinois and Indiana.
23 So what did you mean by Tri-State area?

24 (Laughter)

25 **MS. GROVES:** I meant New York, New Jersey -- I'm

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1 from California, so I may have messed that up. Apologies to
2 those --

3 (Laughter)

4 **JUDGE KIMBALL:** You said New York, New Jersey. What
5 is the other one?

6 **MS. GROVES:** I was hoping no one was going to ask me
7 that.

8 (Laughter)

9 **JUDGE ARLEO:** Pennsylvania.

10 **MS. GROVES:** I was going to guess Pennsylvania.

11 **JUDGE CALDWELL:** Any other questions?

12 **JUDGE ARLEO:** Any preference of New York over New
13 Jersey?

14 **MS. GROVES:** No, Your Honor. I mean, we are pretty
15 agnostic. It just needs to be convenient for the parties and
16 part of the center of gravity. I think that's the most
17 important.

18 **JUDGE ARLEO:** Thank you.

19 **MS. GROVES:** Thank you.

20 **JUDGE CALDWELL:** We have your argument. Thank you.

21 Mr. Watts.

22 **MR. WATTS:** Let me start off by answering Judge
23 Kennelly's question about state AGs. As you know in the
24 opioid litigation --

25 (Court reporter clarification)

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1 **MR. WATTS:** In the opioid litigation there were a
2 lot of state AG that did participate. A small -- less than
3 half hired individual plaintiff's attorneys to do the AGs and
4 then others like Texas did it themselves with coordination
5 with our group. So that's number one.

6 Number two, with respect to mechanism of action,
7 there are two different theories. But putting it
8 simplistically, it deals with oxidative stress on developing
9 neurological system of a baby. We go into a lot more detail
10 than that, but the bottom line is that's what it deals with.

11 Mr. Murdica's argument about 600 different
12 manufacturers and one percent. These cases are about prenatal
13 use of acetaminophen. Not somebody swigging cough medicine
14 when they're not pregnant. That's not what it's about.
15 That's not what we are asking the MDL to be defined about.
16 This grand conspiracy argument about "where are the
17 manufacturers," I explained why we did it.

18 With respect to all of these store-branded
19 acetaminophen, they all have indemnification agreements with
20 the manufacturers. I've been in personal communication with
21 lawyers from Johnson & Johnson. They know this is coming.
22 This is no surprise. But I've also been, you know, at
23 seminars where people are talking about early vetting. So we
24 are ordering these records to make sure that we have that.
25 But it's coming.

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With respect to what we learned in Zantac -- number one, I never sued the retailers, but I did take all of their depositions. And that had to do with the conditions under which Zantac was being stored, and the retailers and distributors in this country did a good job as opposed to the manufacturers who did not, leading to the arrival of in the NDMA.

Lastly, with respect to the Northern District. If you notice my first papers, we threw a footnote in because the panel rules say you have to select somewhere. What I want to avoid is 45 different preemption rulings. And what Judge Kennelly said, we are going to come back here and have a bunch of these rulings that are going to be all over the place.

I found out about Judge Tigard's case. I saw the pleadings with respect to the motion to dismiss. And I said we have a potential and I have a duty to present it to this Court. So we did. There's plenty of good judges out there. I think the judge in Minnesota is fine. I think the judge in Missouri is fine. But we need one person deciding all of these rulings.

JUDGE KIMBALL: What about the workload in the Northern District of California?

MR. WATTS: I have never been too impressed with the argument that districts have workloads. I think you have to

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1 go down to the judge level. And, you know, we presented to
2 you -- I mean, frankly, there's lots of good judges out there.
3 You know, with respect to His Honor Judge Tigar, we presented
4 because of the proceedings in front of him and the preemption
5 arguments that are being made, but there are certainly other
6 judges in San Francisco and Oakland that are, you know,
7 excellent judges that I know from the PGE fire litigation and
8 others. But there are good judges everywhere. You have an
9 abundance of choices.

10 **JUDGE CALDWELL:** Other questions?

11 **MR. WATTS:** Thank you. I appreciate it.

12 **JUDGE CALDWELL:** That concludes the matter in MDL
13 No. 3043.

14 (The proceedings concluded at 10:15 a.m.)

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CERTIFICATE

I, Reagan A. Fiorino, Registered Merit Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 36 inclusive and was delivered electronically and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 7th day of October, 2022.

/s/ Reagan A. Fiorino
Reagan A. Fiorino, RDR, CRR, CRC, CCR
Official Court Reporter